In The

Supreme Court of the United States

OCTOBER TERM, 1950

Nos. 329-330.

AMALGAMATED ASSOCIATION OF STREET, RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 998, ET AL., *Appellants*,

V.

WISCONSIN EMPLOYMENT RELATIONS BOARD, *Appellee*.

BRIEF FOR STATE OF NEBRASKA AS AMICUS CURIAE.

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In 1920 the people of Nebraska adopted a new Constitution and authorized the Legislature of Nebraska to create an Industrial Commission to settle strikes "in any business or vocation affected with a

public interest." The constitutional implementation, Article XV, Sec. 9, reads as follows:

> "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare. An Industrial Commission may be created for the purpose of administering such laws, and appeals shall lie to the Supreme Court from the final orders and judgments of such commission."

Acting under this authority as well as the power bestowed in Article V, Sec. 1, to create "other courts inferior to the supreme court", the Legislature of Nebraska in 1947 established the Court of Industrial Relations. (Laws of Nebraska 1947, Chapter 178, page 585; R. S. Nebraska, 1949 Supp., Sections 48-801-823.)

The second section of this act declared the following "public policy of the State of Nebraska":

> "(1) The continuous, uninterrupted and proper functioning and operation of the governmental service including governmental service in a proprietary capacity and of public utilities engaged in the business of furnishing transportation for hire, telephone service, telegraph service, electric light, heat or power service, gas for heating or illuminating, whether natural or artificial, or water service, or any one or more of them, to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the

operation of governmental service, including governmental service in a proprietary capacity or any such utility by reason of industrial disputes therein. It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom. It is therefore further declared that governmental service including governmental service in a proprietary capacity and the service of such public utilities are clothed with a vital public interest and to protect same it is necessary that the relations between the employers and employees in such industries be regulated by the State of Nebraska to the extent and in the manner hereinafter provided;

"(2) No right shall exist in any natural or corporate person or group of persons to hinder, delay, limit, or suspend the continuity or efficiency of any governmental service or governmental service in a proprietary capacity of this state, either by strike, lockout, or other means; and

"(3) No right shall exist in any natural or corporate person or group of persons to hinder, delay, limit, or suspend the continuity or efficiency of any public utility service, either by strike, lockout, or other means."

Section 10 of the Act provides:

"All industrial disputes involving governmental service in a proprietary capacity or service of a public utility shall be settled by invoking the jurisdiction of the Court of Industrial Relations. * * *"

The first section of the Act makes it plain that public power and irrigation districts, which encom-

pass the entire State of Nebraska to the exclusion of all private power companies, as well as other public utilities, are subject to the Act.

"(3) The term 'governmental service in a proprietary capacity' shall mean and include any service performed under employment in any public utility, or commercial or business enterprise, which is owned, managed or operated by the State of Nebraska, any political or governmental subdivision thereof, any public corporation, or any public power district or public power and irrigation district.

"(4) The term 'public utility includes any individual, partnership, association, corporation, business trust, or any other organized group of persons, which carrieds on an intrastate business in this state and over which the government of the United States has not assumed exclusive regulation and control, that furnishes transportation for hire, telephone service, telegraph service, electric light, heat and power service, gas for heating or illuminating, whether natural or artificial, or water service, or any one or more thereof."

Section 3 creates "an industrial commission to be known as the Court of Industrial Relations"; and other portions of the Act, with reference to procedure, hearings and penalties are reviewed and printed in the appendix of this brief.

No case from the Industrial Court has yet been reviewed by the Supreme Court of Nebraska, although jurisdiction has been exercised by the Industrial Court in a number of cases.

We submit that the general language in *International Union of U. A. & A.* v. *O'Brien, et al.*, 70 S. Ct. 781, 94 L. Ed. 659, which is seized upon by appellants, was not intended to determine and foreclose the authority of States to protect citizens against the "calamaties or catastrophies" which would inevitably result from strikes of essential public services in the public utility field. No such question was presented in the O'Brien case, and earlier decisions of this court under the Labor Management Relations Act of 1947, as well as prior legislation, clearly preserve to the states authority to exercise control in this field.

International Union, U. A. W., et al. v. Wisconsin Employment Relations Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651, like the O'Brien case, supra, involved a private business as distinguished from a public utility. In considering "state action in relation to both Federal Acts" (National Labor Relations Act and Labor Management Relations Act) in the former case, this court held:

> "Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. * * *" (93 L. Ed. 662).
>
> "* * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested.' Allen-Bradley Local, U. E. R. M. W. v. Wisconsin Employment Relations Bd., 315 U.

S. 740, 749, 750, 86 L. Ed. 1154, 1164, 1165, 62 S. Ct. 820. We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case.

"Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular union conduct, from which an exclusion of state power could be implied. The Labor Management Relations Act declared it to be an unfair labor practice for a union to induce or engage in a strike or concerted refusal to work where an object thereof is any of certain enumerated ones. Sec. 8 (b) (4), 61 Stat. 140, 141, c. 120, 129 U. S. C. A., Sec. 158 (b) (4), 9 F. C. A., title 29, Sec. 158 (b) (4). Nevertheless the conduct here described is not forbidden by this Act and no proceeding is authorized by which the Federal Board may deal with it in any manner. While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. * * * (93 L. Ed. 662-3).

"* * * And Sec. 13 plus the definition only provides that 'Nothing in this Act * * * shall be construed so as either to interfere with or impede' the right to engage in these activities. What other Acts or other state laws might do is not attempted to be regulated by this section. Since reading the definition into Sec. 13 confers neither federal power to control the activities in question nor any immunity from the exercise of state power in reference to them, it can have no effect on the

right of the state to resort to its own reserved power over coercive conduct as it has done in this instance.

"If we were to read Sec. 13 as we are urged to do, to make the strike an absolute right and the definition to extend the right to all other variations of the strike, the effect would be to legalize beyond the power of any state or federal authorities to control not only the intermittent stoppages such as we have here but also the slow-down and perhaps the sit-down strike as well. Cf. Allen-Bradley Local, U. E. R. M. W. v. Wisconsin Employment Relations Bd. 315 U. S. 740, 751, 86 L. Ed. 1154, 1165, 62 S. Ct. 820. * * *." (93 L. Ed. 668).

"We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act over a subject normally within its exclusive power and reachable by federal regulation only because of its effects on that interstate commerce which Congress may regulate. National Labor Relations Bd. v. Jones & L. Steel Corp., 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352; Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026." (93 L. Ed. 669).

It is well settled that there is not and cannot be any constitutional right to "trial by combat" in the public utility field.

Int. Union v. *Wisconsin Employment Relations Board*, supra (93 L. Ed. 662);

Carpenters and Joiners Union v. *Ritters Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143.

Nothing in the legislative history of the Labor Management Relations Act indicates any intention to exclude states from continuing to perform their historical function in the public utility field except in those cases where an "entire industry or a substantial part thereof" sustains a strike which "will imperil the national health or safety" (29 U. S. C. A., Sec. 178).

The remarks of Senator Taft, referred to in the O'Brien decision, supra, as well as other legislative comment with reference to the public utility field all relate to proposed action by the federal government. The fact that the "Government" did not itself wish to enter upon "fixing wages" and "price fixing" in the utility field, does not mean that any intention was thereby manifested to occupy the field exclusively and prohibit all such state action. The further fact that the federal government did not wish to set up a labor court to consider and resolve all controversies in the utility field does not supply a legal basis for restraining state action by implication.

The attitude of Congress in this matter is consistent with the actualities of the situation and recognizes that price and rate making in the utility field is quite largely performed at the state level and therefore to the extent that regulating strikes involves rate making, the function logically belongs and should be left with the states. In Nebraska the State Railway Commission constitutes the utilities regulating agency and has constitutional as well as statutory authority.

Constitution of Nebraska, Art. 4, Sec. 20;
R. S. Nebraska 1943, Chapters 74, 75, 86, Ar-

ticle 3 of Chapter 70 and Article 5 of Chapter 54.

The silence of the congressional act as to strikes in the utility field involving less than the "national health or safety" constitutes a recognition of state authority. No "cession of jurisdiction" was necessary, since as stated in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 69 S. Ct. 584, 93 L. Ed. 691:

> "Where the State and federal laws do not overlap, no cession is necessary because the States jurisdiction is unimpaired." (93 L. Ed. 702).

The present situation is well described by certain language in *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 62 S. Ct. 491, 86 L. Ed. 754:

> "* * * Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. * * *." (86 L. Ed. 762).

This was the view expressed by this court as to the *National Labor Relations Act in Bethlehem Steel Co.* v. *New York Labor Relations Board,* 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234:

> "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject or relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee re-

lation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. * * *." (91 L. Ed. 1245).

The foregoing views conform to the strict standards set by this court in determining whether state statutes are superseded by federal acts. *People* v. *Breen,* 326 Mich. 720, 40 N. W. (2d) 778, quotes from 15 C. J. S. Sec. 15, on this point as follows:

"* * * the exercise by the state of its police power, which would be valid if not superseded by federal action in the regulation of interstate commerce, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled nor consistently stand together." (page275).

"To have the effect of superseding a state statute, it is not sufficient that a congressional regulation of commerce invades the same field; it must expressly cover the precise subject matter, or show a purpose to take legislative possession of the whole field, or at least a purpose to legislate on the particular subject, or an intention to supersede or exclude state action; and this purpose must be manifested by a valid statute." (page 274; 40 N. W. [2d] 779, 780).

To the same effect:

Allen-Bradley Local No. 1111 v. *Wisconsin E. R. Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154;

Kelly v. *Washington,* 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3;

Ill. Central R. Co. v. *Public Utilities Comm.*, 245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425.

In order for state legislation to fail there must be an actual and "irreconcilable conflict" with specific federal enactments.

Hill v. *Florida*, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782;

Bethlehem Steel Co. v. *New York State Labor Rel. Board*, 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234.

Our contentions as to the O'Brien decision and the effect of federal legislation have been sustained recently by the Supreme Court of New Jersey in the matter of arbitration between *New Jersey Bell Tel. Co. and Communication Workers of America*, (October 10, 1950) — N. J. —, 75 Atl. (2d) 721. On the claim of federal preemption of the field the opinion states:

> "The Company's first contention is that the statute is unconstitutional because it invades a field preempted by the Federal Government through the enactment of the National Labor Relations Act, 29 U. S. C. A., Sec. 151, *et. seq.*, and the Labor-Management Relations Act, 1947, 29 U. S. C. A., Sec. 141, *et seq.* This question was fully explored and disposed of by this court in *Van Riper* v. *Traffic Telephone Workers Federation of N. J.*, 2 N. J. 335 (1949), wherein we decided that our State statute was not in conflict with Federal legislation. The Company argues, however, that since our decision on this point in the Van Riper case, *supra*, the United State Supreme Court, in *International Union of U. A. A. & A.* v. *O'Brien*, — U. S. —, 94 L. Ed. (Adv. Op.) 659 (May 8, 1950), had decided that the right

to strike peacefully for higher wages is established by the Federal legislation, that the latter does not permit concurrent State regulation in this area, that since Congress has occupied this field it is closed to State regulation, and ergo, that our State statute is unconstitutional.

"Our analysis of the *O'Brien* case, *supra*, does not lead us to the same conclusion. In that case the constitutionality of the strike vote provision of the Michigan labor mediation law was questioned. The Union had struck against a private industrial organization, engaged in interstate commerce, without conforming to the prescribed state procedure; the state procedure differed from that provided in the Federal legislation and the court decided that because of the conflict the state statute was unconstitutional. The court said that the regulation of the right to peacefully strike for higher wages had been preempted by Congress, but the case being decided by the court involved a statute regulating the right to strike against private industry.

"It was not a statute such as the New Jersey statute, in which a state, in the exercise of its sovereignty, seeks to maintain without interruption the supply of services considered essential to the welfare and health of its people, being furnished by a public utility, operating under a franchise by the state, whose services furnished are primarily intrastate. It is significant that in the *O'Brien* case, *supra*, the court said, 'Even if some legislation in this area could be sustained, the particular statute before us could not stand. For it conflicts with the Federal Act.' Our examination of the Federal Act discloses no provision therein which prohibits a state, in the exercise of its police power, from protecting itself against strikes or lockouts in public utilities which would

imperil the health and safety of its citizens. It is noted that the Labor-Management Relations Act, 1947, in Sections 206-210, authorizes the Federal Government to proceed, pursuant thereto, to enjoin threatened strikes or lockouts which, if permitted to occur, might imperil the national health or safety. We find no authority in the Federal Act for the Federal Government to so act to prevent similar emergencies which may be state-wide only and which may be of insufficient magnitude to imperil the national health and safety. Since we find no provision in the Federal Act prohibiting a state from enjoining threatened strikes or lockouts in public utilities which, if permitted to occur, might imperil the health, welfare and safety of its people in an emergency of state-wide proportions only, since the Federal Act does not authorize the Federal Government to act in such cases, and since the 'intention of Congress to exclude the states from exerting their police power must be clearly manifested', *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 86 L. Ed. 1154 (1942), we conclude that the right of the states to prohibit strikes or lockouts in this sphere has not been preempted by Congress, and that the *O'Brien* case, *supra*, is inapplicable to the present situation.

"We reiterate the statement made in the *Van Riper* case, *supra*, that 'Thus the power still resides in the states in a proper case to prohibit strikes notwithstanding the existing Federal legislation.' We consider this a 'proper case' within the foregoing statement and find nothing in the *O'Brien* case, *supra*, of a dissuasive nature."

The Wisconsin Supreme Court in the recent case of *Wisconsin Employment Relations Board* v. *Milwaukee Gas Light Co.*, — Wis. —, 44 N. W. (2d) 547

(Nov. 8, 1950), extensively quotes from the above New Jersey case and concludes that the O'Brien decision of this court has no application to public utilities.

This conclusion coincides with the view expressed soon after enactment of the Taft-Hartley Act that "state compulsory arbitration provisions are suspended" in the public utility field only in those "major utility disputes" of "nation wide importance". The Taft-Hartley Act and State Jurisdiction Over Labor Relations—Russel A. Smith, 46 Michigan Law Review (March, 1948) 593, 623. See also, Constitutionality of Compulsory Arbitration Statutes in the Public Utility Field, 44 Illinois Law Rev. 546.

The extent to which American citizens and their homes, both urban and rural are dependent upon public utility services of transportation, electricity, communications and gas cannot be over-emphasized. In a very real sense continuity of these services is indispensable to public health and safety. Yet under federal law, no recourse whatever exists for a break-down of these essentials until "national health or safety" is imperiled.

The consequences within states and local areas of discontinuances of these essentials is no less tragic and dangerous because all others in this nation are not equal sufferers. The legal vacuum in federal authority now existing is not filled by prospects that if the break-down becomes universal, action by the federal government may be anticipated.

Surely if there is any area where the sovereign power of states should not be rendered helpless and

impotent "by implication", this is it. If, under the commerce power, Congress desires or intends to pre-empt the entire field, is it not fair and reasonable to require that such intention be expressed directly and unequivocally in accordance with historical and accepted standards?

Our contentions in this regard are fully supported by both Committee Reports concerning a proposed National Labor Relations Act of 1949, now pending in the Congress (81st Congress, 1st Session, S. 249, Report No. 99, Part 2, Minority Views). At page 61 the Committee on Labor and Public Welfare recommends that the provision as to a closed shop be rewritten so as to permit overriding of state authority. Citing *Algoma Plywood Co.* v. *Wisconsin Labor Relations Board,* supra, the committee states:

> "* * * The Court, in its later decision, made reference to, but did not find it necessary to rely on, the principle that, 'in cases of concurrent power over commerce *State law remains effective so long as Congress has not manifested an unambiguous purpose that it should be supplanted.*' It is our desire that section 107 will constitute a manifestation of an 'unambiguous purpose' on the part of the Congress to supplant those State laws which seek to regulate or prohibit union-security agreements and check-off provisions in a manner inconsistent with the policy set forth in this provision." (emphasis supplied).

The Minority Report also acknowledges that the provision in the present act was not necessary in order to permit state action in this field. Senator Taft states (p.38):

"While recent decisions of the Supreme Court (*Algoma Plywood* v. *Wisconsin Board* [decided March 7, 1949]), indicate that *section 14 (b) of the Taft-Hartley Act was unnecessary to give validity to State laws* abolishing or regulating compulsory union membership within their borders, we now believe it necessary that the provision be retained. The Court laid considerable stress upon the congressional history of the Wagner Act and found that *it had not been the intent to invalidate State laws even though interstate commerce was involved.* Elimination of the provision now might be construed as reflecting a contrary intent." (emphasis supplied).

The Fundamental Public Utility Obligation of Continuous Service Historically Subjects Both Utilities and Their Employees to State Control of All Threatended Interruptions of Service.

No adequate review of this case may omit full consideration of the unique historical position of public utilities in our legal system. The opinion of the Wisconsin court below concisely and carefully portrays this status and history (42 N. W. [2d] 474).

The historic concept of businesses "affected with a public interest", as this court has declared, reflected common law principles and was founded upon the public nature and character of certain essential enterprises. *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. A good review of the development of the law in this field is contained in Labor and the Law in the Public Utility Field, George Jarvis Thompson, 21 Mich. Law Review 1. From this article and such legislation as the British Conspiracy and Protection of Property Act

of 1875, 38 and 39 Victoria, c. 86, it will be seen that recent legislation to prevent strikes in the public utility business were not entirely unkown in the nineteenth century.

The primary and unqualified obligation of such a business is to continuously serve the public. This responsibility is referred to in *Wilson* v. *New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755:

> "* * * Clear also is it that an obligation rests upon a carrier to carry on its business, and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so, and also that government possesses the full regulatory power to compel performance of such duty." (243 U. S. 349-350).

In the same opinion this court describes the "power to enforce the duty of operation" by regulating employer-employee relations so as not to "leave the public helpless, the whole people ruined, and all the homes of the land submitted to a danger of the most serious character" (243 U. S. 351).

The inability of public utilities to discontinue service is also emphasized in *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103:

> "A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public." (262 U. S. 543).

The foregoing opinion stresses that this power to "compel continuity in a business" is the distinctive

mark of public utility enterprises and justifies the control of employment relationships in that field. See also

1 Teller, Labor Disputes and Collective Bargaining, Sec. 53.

The most important observation concerning *Wilson* v. *New*, supra, and *Wolff Packing Co.* v. *Court of Industrial Relations*, supra, as well as other authorities, is that it is generally recognized that the employee in a public utility business assumes the same obligation as the utility for continuous service. In *Wilson* v. *New*, 243 U. S. 352-353, the opinion of Chief Justice White declares:

> "(b) As to the employee.—Here again it is obvious that what we have previously said is applicable and decisive, since whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he desires, to them, and, by concert of action, to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied, and the resulting right to fix, in case of disagreement and dispute, a standard of wages, as we have seen, necessarily obtained."

In the concurring opinion of Mr. Justice McKenna this responsibility is adverted to as follows:

> "* * * When one enters into interstate commerce, one enters into a service in which the public has an interest, and subjects one's self to its behests. * * *" (243 U. S. 364).

That the public utility employee as well as the employer "owes a direct duty to the public served" is well settled. Labor and the Law in the Public Utility Field, George Jarvis Thompson, 21 Mich. Law Review 1, 13, 14. By entering into such employment the employee voluntarily assumes a public duty that is inconsistent with rights existing in private employment.

Toledo A. A. & N. M. Ry. Co. v. *Penn. Co.*, (c. c. Ohio) 54 Fed 746, aff'd. sub. nom. *Ex Parte Lennon*, 64 Fed. 320 and sub. nom. *Ex Parte Lennon*, 166 U. S. 548, 17 S. Ct. 658.

Burgess Bros. Co. v. *Stewart*, 112 Misc. 347, 184 N. Y. S. 199, 207 aff'd., 194 App. Div. 913, 185 N. Y. S. 85.

Stephens v. *Ohio St. Tel. Co.*, (D. C. Ohio) 240 Fed. 759, 775.

The duty and obligation of both utilities and their employees to provide continuous uninterrupted service has historically justified complete regulation of employer-employee relations in the State of Nebraska even before provision was made in 1920 for establishment of an Industrial Relations Court. In *Short* v. *Omaha & C. B. St. Ry. Co.*, P. U. R. 1920 F. 269, the Nebraska Railway Commission held that it had authority to prescribe wage rates of utilities in order to provide a "continuance of adequate service" (p.273). The Commission cited a number of decisions of the Supreme Court of Nebraska going back to the earliest reports as to the duty and responsibility of providing uninterrupted service. It was concluded that under these authorities the Commission

had jurisdiction to fix a "scale of wages that would attract an adequate number of capable employees to enable the defendant to carry on its service" (p. 273). Significantly, in that case the jurisdiction of the Commission was invoked by the employees.

The foregoing case was considered (like the case at bar should be viewed) as involving:

> "* * * the question of whether or not the people have the power to protect themselves in the continuance of an important public service when that service is threatened with interruption or destruction. It seems to us to propound the question is to answer it. It is self-evident that the public has a right to protect itself; that the people do not have to sit idly by and see the industries and social life of a whole community brought to a state of paralysis because the owners and the employees of a transportation system are not in agreement as to wages." (P. U. R. 1920 F. 277-278).

Public Power Strikes in Nebraska.

In one area of utility regulation Nebraska has a situation that is different from most states. As indicated earlier, private power companies have been eliminated in Nebraska and public power companies occupy the entire field. These public districts, organized as public corporations of the state, constitute in each case a "governmental subdivision of the State."

Platte Valley Public Power & Irrigation District v. *County of Lincoln*, 144 Neb. 584, 14 N. W. (2d) 202.

Strikes involving these districts are prohibited under the legislation reviewed before. By reason of

their legal status, strikes against such districts become in effect strikes against a subdivision of the state government.

Federal legislation (29 U. S. C. A., Sec. 188) forbids strikes against "any agency" of the United States "including wholly owned government corporations". Surely no one would contend that this prohibition in federal legislation operates to authorize strikes against state governments and agencies thereof. A decision however that federal legislation completely occupies and preempts the field would lead to the conclusion that states are powerless to prevent strikes against themselves. No such result was intended in any existing federal legislation and we submit that no such legislation could be constitutionally enacted by the Congress.

If we are to approach the problem presented in the present case realistically and in the broadest sense, we will find that under modern trends the local public utility is fast becoming a monopoly amounting to a de facto department or agency of state government. This development is very well described by Professor Clarence M. Updegraff in an article now being published in 36 Iowa Law Review 61, "Compulsory Settlement of Public Utility Disputes."

> "It will be recognized that since all public utility properties are owned and operated for purposes which entitle the utility companies to take lands of private owners for their use without violating the 'due process' clause, the utility is in the most complete sense discharging a 'public service.' It is analogous to a branch or department of the state government. Virtually all of the bus-

inesses now referred to as public utilities are in one part of the world or another, commonly owned and operated by sovereign states, so that in a very real and correct sense it may be said that the public utilities are to be identified with government agencies for which they are in a sense, substituted. Since they have become monopolies because of their duty, like that of the government, to serve all at reasonable rates, they have reached a point of development where it becomes necessary to sustain their unfailing operation just as government itself is sustained. This is to secure protection of the health, public safety, and general welfare of the population or general public. Indeed, the public health, morals, safety, and general welfare (so zealously guarded by the sovereign police power) would be much more quickly impaired by discontinuance of certain public utility services than by temporary suspension of many governmental agencies.

"Thus, it appears that there is reason to recognize that a work stoppage affecting a public utility is as important as, and in fact very much like in its consequences, a stoppage of work affecting an essential governmental agency."

36 Iowa Law Review 64.

Referring to statutes such as those involved in this case, Professor Updegraff states:

"* * * The legislatures which have passed the statutes here under consideration and the New Jersey court, which has passed upon the same, have recognized that the individual employees who elect to work for public utilities may properly be held to have less freedom in respect to collective action than employees in the private industries.

"This also has numerous precedents, which appear to support the conclusion that workers in

the public utilities field do not have all the rights and privileges in respect to collective bargaining and application of collective pressures upon their employers which are available to employees in nonpublic activities. Other obvious situations where this is true are seen in the Army, Navy, police forces, fire fighting forces, and various other public and quasi-public activities. All the arguments used to sustain the conclusion that strikes against the government may be prohibited operate in the same measure to sustain the contention that strikes against public utilities may be regulated and restricted. * * *"

36 Iowa Law Review 69.

The Wisconsin Supreme Court in the recent case of *Wisconsin Employment Relations Board* v. *Milwaukee Gas Light Co.*, — Wis. —, 44 N. W. (2d) 547, (Nov. 8, 1950), adopts the reasoning above outlined and states:

"* * * Congress has no power to question the states' control over their utilities. That power rests with the states. The states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. Under a proper interpretation of the federal act, the state is still sovereign in the field covered by the public utility anti-strike law. The federal act makes provision for national emergencies, but it does not and cannot legislate in the field of local emergencies." (44 N. W. [2d] 551).

CONCLUSION.

We submit that Congress has not expressed an unambiguous purpose and intention to exclude states

from exercising their police power to protect the public health, peace and safety by insuring continuity of essential services in the public utility field; and that as agencies and instrumentalities of states, public utilities and their employees are subject to complete control and regulation by state governments.

Respectfully submitted,

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APPENDIX.

Pertinent Sections of Legislative Bill No. 349, Laws of Nebraska, Chapter 178, page 585, Revised Statutes of Nebraska, 1949 Cumulative Supplement, Sections 48-801 to 48-823.

Sec. 4. The Court of Industrial Relations shall be composed of three judges who shall be appointed by the Governor, with the advice and consent of the Legislature. Of the three judges first appointed, one shall be appointed for a term of two years, one for a term of four years, and one for a term of six years, the terms to begin simultaneously upon qualification of the persons to be appointed within thirty days after the effective date of this act. Upon the expiration of the term of the three judges first appointed, each succeeding judge shall be appointed and hold office for a term of six years and until his successor shall have qualified. In case of a vacancy in the office of judge of the Court of Industrial Relations, the Governor shall appoint his successor to fill the vacancy for the unexpired term.

Sec. 5. The judges of the Court of Industrial Relational shall not be appointed because they are representatives of either capital or labor, but they shall be appointed because of their experience and knowledge in legal, financial, labor and industrial matters.

Sec. 11. Any employer, employee, or labor organization, or the Attorney General of Nebraska on his own intiative or by order of the Governor, when any industrial dispute exists between parties as set forth in section 10 of this act, may file a petition with the Court of Industrial Relations invoking its jurisdiction.

Sec. 13. Whenever the jurisdiction of the Court of Industrial Relations is invoked, notice of the pendency of the proceedings shall be given either by summons issued and served as summonses are issued and served in the district courts, or, in the discretion of the court, by publication in a legal newspaper of general circulation in the State of Nebraska two consecutive weeks. Such notice shall fix the time and place for hearing and in general terms set forth the matters to be heard and determined. Such notice may be waived by voluntary appearance. The court may in its discretion use such additional means of publication as the court may deem advisable.

Sec. 14. The Court of Industrial Relations may employ such expert accountants, engineers, stenographers, attorneys and other employees as the court finds necessary. Officers and employees of the court whose salaries are not fixed by law shall be paid such compensation as may be fixed by the court with the approval of the Governor.

Sec. 16. After a petition has been filed under the provisions of section 11 of this act, the clerk shall immediately notify the members of the Court of Industrial Relations, which court shall promptly convene at its office to take such preliminary proceedings

as may be necessary to insure a prompt hearing and speedy adjudication of the industrial dispute. The court shall have power and authority upon its own initiative to make such temporary findings and orders as may be necessary to preserve and protect the status of the parties, property and public interest involved, pending final determination of the issues. In the event of an industrial dispute between employer and employees of a public utility not operated by government in its proprietary capacity, where such employer and employees have failed or refused to bargain in good faith concerning the matters in dispute, the court may order such bargaining to be begun or resumed, as the case may be, and may make any such order or orders as may be appropriate to govern the situation pending such bargaining.

Sec. 18. The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same. In making such findings and order or orders, the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions, in the same labor market area and, if none, in adjoining labor market areas within the state and which in addition bear a generally comparable relationship to wage rates paid and conditions of employment maintained by all other employers in the same labor market area. The court shall determine in each case, what constitutes "the same labor market area" or

"adjoining labor market areas" in the state. If an employer has more than one plant or office and some or all of such plants or offices are found to be located in separate labor market areas, the court may establish separate wage rates or schedules of wage rates, and separate conditions of employment, for all plants and offices in each such labor market area. In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees. Any order or orders entered may be modified on the court's own motion or on application by any of the parties affected, but only upon a showing of a change in the conditions from those prevailing at the time the original order was entered.

Sec. 21. It shall be unlawful for any person:

(1) To hinder, delay, limit or suspend the continuity or efficiency of any governmental service or any governmental service in a proprietary capacity, or the service of any public utility, by lockout, strike, slowdown, or other work stoppage;

(2) To coerce, instigate, induce, conspire with, intimidate or encourage any person to participate in any lockout, strike, slowdown or other work stoppage, which would hinder, delay, limit or suspend the continuity or efficiency of any governmental service or

governmental service in a proprietary capacity, or the service of any public utility; or

(3) To aid or assist any such lockout, strike, slowdown, or other work stoppage by giving direction or guidance in the conduct of any such lockout, strike, slowdown or other work stoppage or by providing funds for the conduct or direction thereof, or for the payment of strike, unemployment or other benefits to those participating therein.

Any person who willfully violates any of the provisions of this section, upon conviction thereof, shall be subject to a fine of not less than ten dollars nor more than five thousand dollars, or to imprisonment not less than five days nor more than one year, or to both fine and imprisonment.

Sec. 22. No provision of this act shall be construed to require an employee to work without his consent, or to make illegal the quitting of his job or withdrawal from his place of employment unless done in concert or by agreement with others.